Office-Supreme Court, U.S.
FILED
FEB 11 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1129

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

PATRICIA CONTI AND RICHARD CONTI,
husband and wife,
Petitioners

v.

FORD MOTOR COMPANY,
Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Joseph V. Pinto, Esquire
Nancy L. Siegel, Esquire
WHITE AND WILLIAMS
17th Floor
1234 Market Street
Philadelphia, PA 19107
(215) 854-7094
(215) 854-7156

PACKARD PRESS / LEGAL DIVISION, 10th & SPRING GARDEN STREETS, PHILA., PA. 19123 (215) 236-2000

QUESTIONS PRESENTED

1. Did the Court of Appeals for the Third Circuit properly apply Pennsylvania law in ordering entry of Judgment N.O.V.?

2. Did the Court of Appeals for the Third Circuit err in not granting a new trial as an alternative to Judgment N.O.V. where the petitioners never raised any reason or ground for doing so?

PARTIES

The caption to the case contains the name of all parties to the proceedings in the Court of Appeals for the Third Circuit whose judgment is sought to be reviewed with the exception of Richard Conti as a third-party defendant.

In response to United States Supreme Court Rule 28.1, Ford Motor Company states that it has no parent company. Its less than wholly owned subsidiaries and affiliates are listed in the appendix.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties	i
Table of Contents	ii
Table of Authorities	iii
Statement of the Case	1
Summary of Argument	2
Reasons for Denying the Writ:	
I. The Third Circuit's application of Pennsylvania law and its Order granting judgment n.o.v. presents no federal question	3
II. Under the circumstances, the entry of judgment n.o.v. was clearly appropriate and presents nothing for this court to review	4
Conclusion	5

TABLE OF AUTHORITIES

Cases: Page

Fisher v. Valtz, 496 F.2d 333 (3rd Cir. 1974) 3

Howes v. Great Lakes Press Corp., 679 F.2d 1023 (2nd Cir. 1982) 3

Neely v. Ebby Construction Co., 386 U.S. 317 (1966) 3,4,5

Patton v. Yount, ____ U.S. ____, 104 S. Ct. 2885 (1984) 3

Constitution:

Seventh Amendment 2,3

Other Authority:

Federal Rule of Civil Procedure 50(d) 2,4

No. 84-1129

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

PATRICIA CONTI AND RICHARD CONTI,
husband and wife,

Petitioners

v.

FORD MOTOR COMPANY,

Respondent

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

This product liability action arises out of an incident that happened on November 11, 1980 when Patricia Conti was injured as her husband, Richard, backed up a 1984 Ford Mustang automobile while she was climbing into it. Patricia and Richard Conti filed suit against Ford Motor Company in the United States District Court for the Eastern District of Pennsylvania alleging negligent design and failure to warn. Jurisdiction was predicated on diversity of citizenship. Ford joined Richard Conti, the husband and driver, as a third-party defendant, alleging that his negligence caused the accident.

On January 7, 1983, after three days of trial, the jury in answer to special Interrogatories concluded: (1) Ford was not liable to Patricia Conti because of the design of the automobile; (2) Ford was liable to Mrs. Conti on the warning theory; (3) Richard Conti's negligence contributed to the happening of the accident by 75 percent; (4) Mrs. Conti sustained $650,000.00 in damages; (5) Mr. Conti sustained damages of $15,000.00.

After the Honorable John P. Fullam entered judgment in favor of Mrs. and Mrs. Conti and against Ford Motor Company, Ford timely filed alternative motions for judgment n.o.v. and new trial which were denied by Judge Fullam on September 26, 1983. Ford Motor Company appealed to the United States Court of Appeals for the Third Circuit. On September 17, 1984, the Third Circuit filed its opinion reversing the trial court and remanding for entry of judgment notwithstanding the verdict in favor of Ford Motor Company. The Court of Appeals denied the Contis' petition for rehearing en banc.

The Third Circuit concluded that the district court erred in submitting the issue of failure to warn to the jury since, as a matter of law, the Contis had failed to show that the absence of an adequate warning was a proximate cause of the accident.

SUMMARY OF ARGUMENT

No substantial federal or constitutional questions have been presented by petitioners. The Third Circuit exercised its proper scope of review and was within its power under Rule 50(d) when it granted judgment n.o.v. Moreover, neither the Seventh Amendment nor Rule 50(d) requires that the petitioners be granted a new trial.

REASONS FOR DENYING THE WRIT

I. THE THIRD CIRCUIT'S APPLICATION OF PENNSYLVANIA LAW AND ITS ORDER GRANTING JUDGMENT N.O.V. PRESENTS NO FEDERAL QUESTION.

The petitioners argue that this court should review this "ordinary" diversity products-liability case because it presents "an unfortunate and reoccurring [sic] propensity of the Third Circuit to manipulate the law-fact distinction. . ." which has deprived them of their Seventh Amendment guarantee of a new trial.[1] This argument is without merit. This Court has held that the Seventh Amendment does not bar an appellate court from granting a judgment n.o.v. *Neely v. Ebby Construction Co.*, 386 U.S. 317, 322 (1966). The Court of Appeals for the Third Circuit has, in this instance, carried out its designated judicial function, that of reviewing the record to see if the evidence supports the jury's finding and, if it does not, correcting the error. *Howes v. Great Lakes Press Corp.*, 679 F.2d 1023, 1029-30 (2nd Cir. 1982); *Fisher v. Valtz*, 496 F.2d 333, 349 (3rd Cir. 1974).

Although the petitioners have purportedly raised a Seventh Amendment issue, their real complaint is that the Court of Appeals was selective in its reference to the record. To support this claim, petitioners cite eight aspects of the record which the Third Circuit allegedly ignored. *None* of these examples goes to the issue of causation. Neither in the Court of Appeals nor in this Court have the plaintiffs *ever* cited any evidence that an adequate warning would or could have prevented the accident. It is precisely this lack of evidence that forced the

1. The petitioners were only able to cite one case, *Patton v. Yount*, ____ U.S. ____, 104 S. Ct. 2885 (1984), in which this Court reversed the Third Circuit for confusing the fact-law distinction. One case hardly supports the petitioners' charge of a "reoccurring [sic] propensity".

Court of Appeals to conclude that, as a matter of law, there was no evidence to support a conclusion that the absence of a warning was a cause of the accident.

II. UNDER THE CIRCUMSTANCES, THE ENTRY OF JUDGMENT N.O.V. WAS CLEARLY APPROPRIATE AND PRESENTS NOTHING FOR THIS COURT TO REVIEW.

Petitioners second argument is that the Court of Appeals should have ordered a new trial rather than Judgment N.O.V., thereby giving petitioners a second chance to prove what they failed to prove the first time.

Rule 50(d), upon which petitioners rely, provides as follows:

> If the motion for judgment notwithstanding the verdict is denied, the party who prevails on that motion may, as appellee, assert grounds entitling him to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment notwithstanding the verdict. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

Thus, as this Court recognized in *Neely v. Ebby*, 386 U.S. 317 (1966), Rule 50(d) preserves to the party who prevailed in the District Court the right to urge the Court of Appeals to award a new trial if that court concludes that the motion for judgment N.O.V. should have been granted.

> [I]t should not be an undue burden in the course of arguing for his verdict to indicate in his brief why he is entitled to a new trial should his judgment be set aside. Moreover, the appellee can choose for his own convenience when to make his case for a new trial:

> He may bring his grounds for new trial to the trial judge's attention when defendant first makes an n.o.v. motion, he may argue this question in his brief to the Court of Appeals, or he may in suitable situations seek rehearing from the Court of Appeals after his judgment has been reversed.

Neely v. Ebby Construction Co., 386 U.S. 317, 328-29. Petitioners never took advantage of this rule. In fact, the petition for certiorari is petitioners' first suggestion that a new trial rather than Judgment N.O.V. was the appropriate remedy.

The petitioners' charge that the Court of Appeals has foreclosed them from trying their case on the theory of the defective design of the automobile is simply ludicrous. That issue was fully litigated and decided by the jury adversely to the plaintiffs. Petitioners failed to take any exception to this finding in the trial court or in the Court of Appeals. Even in their petition for certiorari, they make no suggestion they did not have a full and fair opportunity to present all available evidence the first time.

The Court of Appeals for the Third Circuit found, as a matter of law, that it was error for the District Court to submit the warning issue to the jury and the plaintiff has failed to advance any possible grounds for a new trial, the Third Circuit properly entered judgment n.o.v.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

WHITE AND WILLIAMS
Attorneys for Respondent

By: Joseph V. Pinto

JOSEPH V. PINTO
NANCY L. SIEGEL

8200P

APPENDIX

List of subsidiaries (other than wholly owned subsidiaries) and affiliates of Ford Motor Company (U.S. Sup. Ct. Rule 28.1).

The principal affiliates and subsidiaries (other than wholly owned subsidiaries) of Ford Motor Company are as follows:

Ford Motor Company of Canada, Limited
Oakville, Canada

Ford Brasil, S.A.
Sao Bernardo Do Campo, Brazil

Ford-Werke A.G.
Cologne, Germany

Ford Motor Company (Belgium) N.V.
Antwerp, Belgium

Ford Motor Company A/S
Copenhagen, Denmark

Oy Ford Ab
Helsinki, Finland

Ford Motor Company Aktiebolog
Stockholm, Sweden

Ford Nederland B.V.
Amsterdam, The Netherlands

Eveleth Taconite Company
Eveleth, Minnesota

Ford Lio Ho Motor Company LTD
Taipei, Taiwan

Fairlane Town Center (A Partnership)
Dearborn, Michigan

Renaissance Center Partnership
Dearborn, Michigan

Fairlane Woods Associates (A Partnership)
Dearborn, Michigan

In addition to the foregoing, Ford Motor Company owns varying interests in the dealers in Ford automobiles, trucks or tractors and leasing companies set forth in the following list. The list was accurate as of December, 1982 and is the most current listing available:

Banner Ford
Decatur, GA

Billy Howell Ford-Merc.
Cumming, GA

Bo Lovein Ford
Nashville, PA

Coastal Ford
Mobile, AL

Garden City Ford
Augusta, GA

George Dempsey Ford
Waycross, GA

Heritage Ford/L-M
Cookeville, TN

King's Colonial Ford
Brunswick, GA

Lynchburg Ford
Lynchburg, VA

Marshal Mize Ford
Hixson, TN

Metro Ford
Miami, FL

Miracle Ford
Gallatin, TN

Mtn. View Ford
Chattanooga, TN

Old South Ford
Lexington, NC

Perimeter Ford
Atlanta, GA

Spalding Ford/L-M
Griffin, GA

Springfield Ford/L-M
Springfield, TN

Tropical Ford
Winter Garden, FL

Two Rivers Ford
Donelson, TN

Universal Ford
Richmond, VA

Vic Bailey Ford
Spartanburg, SC

Friendly LM
Salem, VA

Ft. Walton Beach LM
Ft. Walton Beach, FL

Gateway LM
Columbus, GA

Island LM
Merritt Island, FL

Metro LM
Charlotte, NC

Nelson Ford-Mercury
Defuniak Springs, FL

Rowan LM
Winter Haven, FL

Southern LM
Decatur, GA

Wayne Blackwood LM
Rome, GA

Bob Thomas Ford
Hamden, CT

Chemung Ford
Elmira, NY

Fournier Ford
E. Providence, RI

Hammonasset Ford/L-M
Madison, CT

Metro Ford
Schenectady, NY

Millinocket Ford-Merc
Millinocket, ME

Orchard Park Ford
Orchard Park, NY

Rainbow Ford
Niagara Fall, NY

Roberts Ford
Attleboro, MA

Roger Karns Ford
Oneonta, NY

Shiretown Ford
Plymouth, MA

Stan Martin Ford
Hudson, NY

Riverside LM
Madison, TN

Springfield LM
Springfield, MA

Austin Ford
Austin, MN

Beloit Ford
Beloit, WI

Ben-Hur Ford
Sioux Falls, SD

Borchers Ford/LM
Rhinelander, WI

Capitol Ford
Madison, WI

County Ford
Jennings, MO

Court Street Ford
Kankakee, IL

Dee Harrison Ford
Monmouth, IL

Family Ford
W. Chicago, IL

Fergus Ford
Skokie, IL

Fox Valley Ford
Aurora, IL

Friendly Ford
Sioux City, IA

Haugen-Brown Ford
Farmington, MN

Heritage Ford-Merc.
Stillwater, MN

Westfield Ford
Westfield, MA

Bay State LM
Framingham, MA

Norman LM
Westbrook, ME

Olympia Fields Ford
Olympia Fields, IL

Rock River Ford
Rockford, IL

Southgate Ford
Milwaukee, WI

Sterling Ford
Sterling, IL

Suburban Ford
Elgin, IL

Superior Ford
Marquette, MI

Venus Ford
Cudahy, WI

Village Ford
Romeoville, IL

West Suburban Ford
West Des Moines, IA

Willowbrook Ford
Willowbrook, IL

Barrington LM
Barrington, IL

Bell LM
Highland Park, IL

Berens LM
Chicago, IL

Highland Park Ford
Highland Park, IL

Karp's Ford/LM
Houghton, MI

Metro Ford
Chicago, IL

Riverside LM
Montgomery, IL

Bill McCoy Ford/LM
Muncie, IN

Capitol City Ford
Indianapolis, IN

Carriage Ford
Clarksville, IN

Country Ford
Belle Vernon, PA

Crossroads Ford
Frankfort, KY

Dick Ruhl Ford
Columbus, OH

Economy Ford
Aliquippa, PA

Ernest White Ford/L-M
Delaware, OH

Fuller Ford
Cincinnati, OH

Landmark Ford
Fairfield, OH

New Castle Ford
New Castle, IN

Paducah Ford
Paducah, KY

Capitol LM
Chicago Hgts, IL

Joe Carini LM
Waukesha, WI

Leader LM
St. Louis, MO

Libertyville LM
Libertyville, IL

Park Ridge LM
Park Ridge, IL

Astley LM
Chillicothe, OH

Jim Dixon LM
Fairfield, OH

Star LM
Cincinnati, OH

Tatone LM
Fairborn, OH

Taylor LM
Cincinnati, OH

Blue Springs Ford
Blue Springs, MO

Broadway Ford
Edmond, OK

Champion Ford
Dallas, TX

Friendly Ford
Tupelo, MS

Gus Shaffar Ford
Joplin, MO

Indian Springs Ford
Kansas City, KS

Parkview Ford
Middletown, OH

Ramsey-Sturman Ford
Pittsburgh, PA

Shoemaker Ford
Springfield, OH

Washington Ford
Washington, PA

Whitewater Ford/LM
Connersville, IN

Bannister LM
Kansas City, MO

Bob Higgins, LM
Texas City, TX

North Hills LM
Hurst, TX

Robert Woodson LM
Wichita Falls, TX

Adrian Ford/LM
Adrian, MI

Al Bennett Ford
Flint, MI

All American Ford
Saginaw, MI

Allegan Ford
Allegan, MI

Alpena Ford/LM
Alpena, MI

Battle Creek Ford
Battle Creek, MI

Candy Ford-Mercury
Charlotte, MI

Interstate Ford
St. Joseph, MO

Northwest Ford
Hempstead, TX

Republic Ford
Republic, MO

Ron Roberts Ford
Wichita Falls, TX

Starkville Ford-Mercury
Starkville, MS

Stuard Ford
Ferriday, LA

Vantage Ford/L-M
El Dorado, KS

Oregon Ford
Oregon, OH

Riverside Ford
Detroit, MI

Southgate Ford
Southgate, MI

St. Johns Ford
St. Johns, MI

Tom Holzer Ford
Farmington Hills, M

Tom Sheridan Ford-Merc.
Bryan, OH

Kent LM
Kent, OH

Southside LM
Maumee, OH

Stadium LM
Youngstown, OH

Crown Ford
Warren, OH

Dick Boyd Ford
Ludington, MI

Friendly Ford
Monroe, MI

Greenville Ford/LM
Greenville, MI

Mel Farr Ford
Oak Park, MI

Montrose Ford
Akron, OH

Niles Ford/LM
Niles, MI

Empire LM
San Bernardino, CA

Miramar LM
San Diego, CA

San Gabriel LM
San Gabriel, CA

Santa Barbara LM
Santa Barbara, CA

West Covina LM
West Covina, CA

Best Ford
Queens Village, NY

Bridge Ford
Brooklyn, NY

Center City Ford
Williamsport, PA

Champion Ford
Baltimore, MD

Valley LM
Pontiac, MI

Allen Kane Ford
N. Hollywood, CA

Avalon Ford
Carson, CA

Chino Hills Ford
Chino, CA

Grants Ford/L-M
Grants, NM

Love Ford
Lompoc, CA

Mel Burns Ford
Long Beach, CA

Pacific Ford
Long Beach, CA

Covey LM
Phoenix, AZ

Kuhms-Harnish Ford
Mechanicsburg, PA

Manhattan Ford/L-M
New York, NY

Northport Ford
E. Northport, NY

Poughkeepsie Ford
Poughkeepsie, NY

Tower Ford
Baltimore, MD

Clarks Summit LM
Clarks Summit, PA

Francis Scott Key LM
Frederick, MD

Dan Buckey Ford
Spring Valley, NY

Dick Gidron Ford
Bronx, NY

Empire Ford
Mt. Vernon, NY

Family Ford
Carlisle, PA

Focaro Ford
Staten Island, NY

Freedom Ford
Wilmington, DE

Garnet Ford
Media, PA

Gateway Ford
Ozone Park, NY

Gold Star Ford
Shenandoah, PA

San Bruno Ford
San Bruno, CA

Central LM
Eugene, OR

Middlekauff LM
Salt Lake City, UT

Mission LM
Hayward, CA

Olympic LM
Seattle, WA

Shen LM
Burlingame, CA

Hassett LM
Wantagh, NY

Heritage LM
Hackensack, NJ

Northeast LM
Philadelphia, PA

Big Valley Ford
Stockton, CA

Hilltop Ford
Richmond, CA

Novato Ford
Novato, CA

New Rochelle LM
New Rochelle, NY

Arlington Ford
Arlington, WA

Heritage Ford
Modesto, CA

Kingsrow Ford/LM
Hanford, CA

Pittsburgh Ford
Pittsburg, CA